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IN THE

Supreme Court of the United States

October Term, 1966

No. 1006

ELIJAH MUHAMMAD, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 29, 1966.

Citation to Opinions Below

The opinion of the District Court for the District of Arizona (R. 15-21) is set forth in the Appendix hereto, infra, pp. 21-29, and is unreported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 42-47) is set forth in the Appendix hereto, infra, pp. 30-36, and is reported in 366 F.(2d) 298.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Ninth Circuit was made and entered on August 29, 1966 (R. 48). The judgment of the United States District Court for the District of Arizona was made and entered on March 5, 1965 (R. 22-23).

An order by Mr. Justice William O. Douglas extending time to file this petition for a writ of certiorari to and including January 26, 1967, was made and entered in this Court on November 30, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Elijah Muhammad, Albert Brown and Frances Brown are petitioners herein. Bashie Muhammad and Joyce Muhammad, also plaintiff below, are not petitioners herein. The plaintffsi below commenced a civil action in the United States District Court for the District of Arizona pursuant to 28 U.S.C. Section 1346(b) and 1402(b) under the Federal Tort Claims Act for money damages for injury and loss of property caused by the negligence of an employee of the United States acting within the scope of his employment (Transcript of Record on Appeal, hereinafter called "Record", pp. 1-5; 19) (R. 1-6).

Jurisdiction in the United States Court of Appeals for the Ninth Circuit was had under 28 U.S.C. Section 1291 from the final decision of the District Court denying all relief to plaintiffs (R. 22-23). The United States Court of Appeals, by a final decision, reversed the decision of the United States District Court as to Bashie Muhammad and Joyce Muhammad and remanded the action as to them to the District Court and affirmed the judgment of the District Court against Elijah Muhammad, Albert Brown and Frances Brown, the petitioners herein (R. 48).

Questions Presented

I. Whether there was negligence on the part of Albert Brown in driving the car at the time of the accident?

II. Whether the District Court properly disposed of the causes of the petitioners in view of the Arizona Revised Statutes, Title 28, a uniform act regulating traffic and highways in the State of Arizona?

III. Whether the Circuit Court properly disposed of the causes of the petitioners in view of the Arizona Revised Statutes, Title 28, a uniform act regulating traffic and highways in the State of Arizona?

IV. Whether petitioners were denied due process and equal protection of the laws where the Circuit Court found Arnold F. Allison negligent as a matter of law and remanded on the question of whether his negligence was a proximate cause of the accident, without having found that Brown's negligence was the proximate cause of the accident?

Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions:

1. The Constitution of the United States, Amendment XIV, which provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Federal Rules of Civil Procedure, Rule 52(a), which provides in relevant part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

3. Arizona Revised Statutes, Uniform Act Regulating Traffic and Highways. Title 28, Motor Vehicles, Section 28-602, definitions:

* * *

> "Subdivision 6. 'Intersection' means the area embraced within the prolongation or connection of the lateral curb lines, or if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles travelling upon different highways joining at any other angle may come in conflict . . ."

* * *

> "Subdivision 18. 'Stop' when required, means complete cessation from movement."

> "Subdivision 20. 'Through highway' means a highway or portion thereof at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing and when stop signs are erected as provided in this chapter."

* * *

Section 28-138: Right of way is defined as follows:

> " 'Right of way' means the privilege of the immediate use of the highway."

Section 28-181: Violation of Provision of Title, failure or refusal to do or perform required act; Penalty, provides as follows:

"A person violating any provision of this title, or failing or refusing to do or perform any act or thing required by this title, is guilty of a misdemeanor, unless the violation is by law declared to be a felony."

Section 28-773 of the Arizona Revised Statutes provides:

"A. The driver of a vehicle shall stop as required by § 28-855 at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but such driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so proceeding into or across the through highway.

"B. The driver of a vehicle shall likewise stop in obedience to a stop sign as required by this chapter at an intersection where a stop sign is erected at one or more entrances thereto, although not a part of a through highway, and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed."

Section 28-885, Paragraph D, provides:

* * *

"Every driver of a vehicle approaching a stop sign shall stop before entering the cross walk on the near side of the intersection or in the event there is no cross walk, shall stop at a clearly marked stop line, but if none, then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection except when directed to proceed by a police officer or traffic-control signal."

Statement of the Case

Elijah Muhammad, Albert Brown, his chauffeur, and Frances Brown, the wife of Albert Brown, petitioners herein, and Bashie Muhammad and Joyce Muhammad, his wife, plaintiffs below, commenced an action for property damage and personal injuries against the United States of America, a body politic, and Arnold F. Allison, an employee of the Department of Interior, Appellees, in the United States District Court for the District of Arizona, pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) for money damages caused by the negligence of Allison, an Indian employee of the United States, acting within the scope of his employment in a collision involving the parties (Record Transcript of Trial Proceedings, Vol. 1, hereinafter called "R. 11," pp. 5-6).

At the trial by the court without a jury, the parties stipulated that the United States was a proper party defendant, and that the defendant Arnold F. Allison, was at the time of the accident acting within the scope of his employment. Allison at the time of the accident was the driver of an empty school bus maintained by the Department of Interior upon an Indian Reservation through which ran State Through Highway No. 93, near Sacaton, Arizona. Albert Brown was the driver of a Cadillac owned by Elijah Muhammad and occupied by Frances Brown on the front seat and Bashie Muhammad and Joyce Muhammad, as guests, on the rear seat. Their vehicle was proceeding north on the through State Highway 93, at the approximate lawful speed of 60 miles per hour. The designated speed upon said highway was 60 miles per hour by day and 50 miles per hour by night (R. 47, 53, 57-58). The accident occurred at about 3:15 in the afternoon of January 25, 1962.

Allison was employed as a janitor at the school and occasionally substituted for the regular bus drivers from

time to time. At the time of the accident he had an expired Arizona license and operated the bus under a permit issued by the Department of Interior—Indian—Pima Agency (R. 19). The bus was 34 feet 8 inches long (R. 59) with a seating capacity of about 65 persons. The day was cool and cloudy. The terrain was open desert with a slight northerly downgrade on State Highway 93. Allison had brought his bus to a stop some 65 feet from the intersection of Casa Blanca Road with State Highway 93 and about 15 feet west of a stop sign on Casa Blanca Road (R. 162-163). The stop sign was 50 feet west of the intersection (R. 31, 166). Casa Blanca Road ran east and west and was controlled by the stop sign at the intersection with State Highway 93, a through highway running north and south. The state law required all traffic going east to stop and yield to traffic on State Highway 93 (R. 58). Both roadways were asphalt covered. The speed limit on Casa Blanca Road at the intersection with State Highway 93 was zero (R. 47).

Allison had brought the bus to a stop before reaching the intersection, some 14 to 15 feet west of the stop sign on Casa Blanca Road, as aforesaid (R. 157, 162), having a complete full view of the intersection (R. 164). While in this stopped position his eyes followed a big "semi" truck that passed in front of him at the intersection proceeding southward on Route 93 (R. 162). He then advanced the bus and proceeded toward the intersection at the speed of from 5 to 10 miles per hour toward the westerly lateral curb line of the intersection of State Highway 93 when he saw the automobile driven by Brown to his right proceeding north toward the intersection on State Highway 93, his eyes having watched the "semi" truck going south on Route 93 (R. 164-167). He testified that his bus was standing still when he first saw the Cadillac approaching the intersection and that he saw the Cadillac before he proceeded to the intersection (R. 168) and that after having seen the Cadillac he thought it was safe to cross the intersection (R. 169).

He proceeded to cross the intersection looking at all times thereafter to his left and did not look again to the south (R. 169-170; 576-577).

Allison also testified that the bus was "slow moving" with five speeds forward, and that he started in second gear, which did not give "too much acceleration at all times" (R. 53, 166-167; 557-558). The "semi" having passed the intersection the only other car Allison saw was the Cadillac approaching the intersection (R. 165, 576). He started to enter the intersection having seen the Cadillac (R. 169) and did not look to his right again (R. 170). He testified that he moved into the intersection without knowing where the Cadillac was (R. 170), and that he did not know the length of the bus he was driving (R. 170). After seeing the Cadillac approaching the intersection, he made no attempt to stop the bus.

The bus and the Cadillac collided in the northbound lane of State Highway 93 with the Cadillac winding up facing the east on Casa Blanca Road east of State Highway 93 (R. 29). The school bus wound up in a northeasterly position off the highway north of Casa Blanca Road and east of Highway 93 (R. 29). The front end of the Cadillac collided with the right front side of the bus (R. 39).

After the accident, an Arizona State Highway Patrolman, Ronnie Kurtzman, arrived and testified that metal parts of the Cadillac and other debris were scattered about the scene of the collision and grooves or gauge were found in the asphalt pavement following the route of the Cadillac (R. 17, 67). Scuff marks were observed, showing a sideway imprint of tires of the Cadillac tracing off into a kind of diagonal northeasterly direction (R. 330) where the Cadillac had turned in the contact zone.

The trial court having entered judgment against plaintiffs the extensive evidence on the personal injuries and property damage suffered by the plaintiff is not here in

issue, but only the questions of liability. There is essentially no dispute in the record as to matters of fact.

Suffice it to say that the resultant injuries to Brown consisted, among other things, of brain concussion coupled with total amnesia of the events immediately preceding the collision. He was not able to testify as to the events preceding the accident due to this medical reason of physical disability (R. 337).

Frances Brown testified that she was sitting in the front seat with her husband Albert Brown, the driver of the Cadillac, and first saw the bus as it was moving up toward the stop sign (R. 228); that the Cadillac was at that time about a block away from the intersection (R. 254); and that at that time their car was going about 55 to 60 miles per hour (R. 250). She did not testify of having observed the bus other than as stated above.

Captain Paul Blaubaum of the Phoenix Police Department testified for defendants, as an expert witness, to his opinion of the occurrence of the accident after visiting the area on October 4, 1963 with Allison (R. 623). His testimony was that when the vehicle driven by Brown was observed by Allison, according to Allisons' then statement to him, Brown was 1050 feet south of the point of impact and Allison was 94 feet west of the intersection (R. 631-532, 638). He testified that at the minimum distance of 219 feet to a maximum distance of 248 feet from point of contact the Cadillac driven by Brown, based on Allison's statement, would have been travelling at a speed of 60 miles per hour (R. 649). He testified that within a 3-second point of no escape of contact by the two vehicles, which includes the time it took the bus to reach that point, that is 3 second before the impact Brown's vehicle travelling at 60 miles per hour was 41 feet away from the accident point of contact. He further testified that the no escape point of contact for the bus was 16 feet west of the intersection and that if Allison had decided at that point to stop the bus his reaction distance plus

braking distance would still have carried him out into the intersection and out into the impact; that he (Allison) had to make the decision to stop the bus more than 16 feet west of the intersection to avoid the collision and that if Allison was watching the Cadillac at all times before he proceeded into the intersection and had stopped before he came into the intersection there would have been no accident (R. 660-663).

The Court of Appeals made findings of fact and conclusions of law that the District Court's findings of fact and conclusions of law absolving Allison of negligence was insufficient, inadequate, and erroneous, and the same was set aside and the judgment was reversed as to passengers Bashie Muhammad and Joyce Muhammad. These findings are set out at length and in detail at (R. 44-47) properly finding that Allison did not stop at the entrance to the intersection plus a finding that Allison had violated the Arizona Statutes and that such violation was negligence as a matter of law on his part. The Court held further, however, that whether such negligence of Allison was a proximate cause of the accident is a matter to be determined by the trier of facts.

The Court of Appeals applied the proposition of law adopted by the District Court to hold that the record was sufficient to justify negligence on the part of Brown, in support of the defense of contributory negligence in favor of the government, and affirmed the judgment of the District Court as to these petitioners. The exhibits and photographs admitted upon the trial and made a part of the trial record of the case were not before the Court of Appeals although it was requested by plaintiff's counsel that the records and exhibits be forwarded on appeal to the Circuit Court.

Reason for granting the writ

This case presents important questions relating to the right of way under statutes, rules and regulations in automobile travel affecting the vast complex of arterial highways in the States of the United States applying the Uniform Act Relating To Traffic and Highway Safety. This case derogates stated control of highways and nullify the rule of "right of way" as a matter of law to such an indefinable degree, so as to reduce the meaning of right of way to mean nothing at all. Petitioners submit that the findings of fact and conclusions of law affirmed in this case are decisions involving federal questions in conflict with applicable decisions of this court; that the court has decided an important state question in conflict with applicable state law; and that the court has so far departed from the accepted and usual course of judiciary procedure or so far sanctioned such departure by a lower court as to call for the exercise of this court's power and supervision; and petitioners further submit that the questions in this case are of substantial public importance and merit consideration and hearing before this court.

I.

There was no negligence on the part of Albert Brown in driving the car at the time of the accident.

The petitioners were protected in the operation of their vehicle by a state statute specific and clear in defining the duties and rights of vehicles travelling upon intersecting highways and roadways in the State of Arizona. The state of Arizona had adopted the uniform Act Regarding Traffic and Highways safety substantially enforced throughout the United States of America. The language of the statute is clear in defining the meaning of "stop" to mean the complete cessation of movement of one's vehicle

when required to stop at the entrance of a through highway as defined in the statute here. Likewise, the statute is clear in its meaning of the term "right of way", which is defined in the statute to mean the privilege of the immediate use of the highway. A more clear application of this meaning could not be found than the need for the immediate use of the highway where the petitioner was lawfully travelling at 60 miles per hour. The importance of heeding the statute by motorists is underscored by the statute making it a criminal offense to violate the provisions of Title 28 thereof, regarding motor vehicles upon the highways of the State of Arizona.

The District Court was called upon to apply the state statute and not to derogate the statute to common law principles of negligence in determining the liability of the parties. There is found here no Arizona authorities so derogating the purport and intention clearly pronounced in the Uniform Act Regarding Traffic and Highways in the State of Arizona. The Circuit Court of Appeal reversed the judgment of the District Court finding Allison not negligent and in a well-reasoned reversal (R. 46) found instead that Allison was guilty of negligence as a matter of law, in violating the Arizona statute upon the undisputed evidence in the record. The court stated:

> "Where a party violates a statute which is intended to prevent the type of harm which in fact has occurred as a result of that violation, the party is negligent as a matter of law. Prosser, Torts, 202 (3d ed. 1964). In Arizona law the violation of specific requirements of a law or ordinance is negligence par se. Deering v. Carter, 92 Ariz. 329, 376 P.2d 857 (1962); Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956). Barring an affirmative defense, the violating party is liable if his negligence in violating the statute contributed proximately to the cause of the accident. See J. H. Welch v. Gardner, 96 Ariz. 95, 99, 392 P.2d 567 (1964). Stop signs on streets intersecting a protected highway are

designed to facilitate travel on the protected highway and to reduce the risk of collision in the intersection. Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949). Where a party does not obey a stop sign or the law of the right of way at an intersection and a collision in the intersection ensues, then the party is negligent as a matter of law. Wolfe v. Ornelas, 84 Ariz. 115, 324 P.2d 999 (1958); Texas-Arizona Motor Freight v. Mayo, 70 Ariz. 323, 220 P.2d 227 (1950); Clinkscales v. Carver, 22 Cal. 2d 72, 136 P.2d 777 (1943). See also 3 A.L.R. 3d 180 (1965)."

The evidence here shows that Brown was proceeding lawfully upon State Highway 93 and within the speed limit of 60 miles per hour, as was proper. He had the right of way under the protection of the statute, both as to his lawful speed and the privilege of the immediate use of the highway at such speed at the intersection with Casa Blanca Road. His right of way was protected by a stop sign which the court below has found that Allison violated by failing to stop at this intersection. Brown was not thereby negligent and the court had no authority to cite his speed as an element of negligece in driving on the highway.

A driver is entitled to rely on the authenticity of highway speed signs, be the speed limit posted 35 or 60 miles an hour. The vast distinction between this case and the cases relied upon by the courts below is that in this case we are dealing with arterial highway travel in the vast open spaces and not within the limits of metropolitan and city street traffic conditions. Thus, the difference between maximum limits of 25 to 35 miles an hour for travel on city streets and 50 to 60 or more miles per hour for travel upon open country highways, speedways and turnpikes. This case should be approached with this distinction in mind.

In *Mitchell* v. *Emblade,* 80 Ariz. 398, the court held:

"The legal speed limit in the area was an important question . . . speed signs are for the

purpose of advising the driving public and a driver is entitled to rely on their authenticity. He has the right to presume the sign was legally placed and cannot be held negligent in violating the speed limit so long as he complied with the requirement of the sign."

The court pointed out that in that case the lower court had applied the abstract statement of the law of the road stating the rule to the effect that no person should drive at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. But the Supreme Court of Arizona however held that this is not the law stating further that:

"If there was a sign advising plaintiff that the speed limit was 35 miles per hour, he could not be held to be negligent merely for driving 30 miles an hour."

Brown here cannot be held to be negligent under the Arizona law as regards his speed if his speed was not in excess of the 60 mile an hour limit. The court below did not make a finding with reference to Brown's speed based upon the law of the State of Arizona applicable to the speed on the through highway permitted at 60 miles per hour. The findings of the District Court and the Circuit Court of Appeals were therefore clearly erroneous under the State statute as to Brown's speed being a proper element of contributory negligence in this case.

In regard to the finding as to Brown's maintaining a proper lookout, there is first no evidence in the record that Brown failed to maintain a proper lookout that the bus was or was not going to stop. Secondly, the observations of a passenger should not be the test of responsibility of a driver. Contributory negligence is not imputed to a plaintiff for failing to look out for a danger which he has no reasonable cause to apprehend, or to a plaintiff who was deceived by appearances such as the fact that the

bus had slowed down, had stopped, and was slowly inching its way up to the intersection first under and then up to and not exceeding the slow speed of 10 miles where, by any and all reason, the vehicle should be able to stop instantly and where such appearances are calculated to deceive an ordinary prudent person, if he intended not yield the right of way. "The plaintiff's rights depended upon what was reasonably necessary for her to do as the situation appeared to her rather than as the situation was in fact." *Managan* v. *Des Moines City R. Co.*, 200 Iowa 597 203 N.W. 705, 41 A.L.R. 368.

The Supreme Court of the United States here has spoken on the degree and standard of care of motorists and said that contributory negligence is to be determined not according to what the plaintiff or decedent might have done, but according to what a reasonable person would have done under the circumstances and certiorari was granted limited to the question of whether the District Court properly disposed of the cases in view of Illinois revised statutes. 1937 Chap. 70, Section 2. *Stephenson* v. *Grand Truck Western R. Co.*, (CCA 7) 110 F. 2d 401, 132 A.L.R. 455, Writ of Certiorari granted in 310 U.S. 623, 84 L. ed. 1395, 60 S. Ct. 1101, 1102.

The Arizona cases make clear the right of way of the driver on the through highway, such as the plaintiff driver on state highway 93. In *Marks* v. *Godding*, 96 Ariz. 253, 394 P.2d 192, 194, (1964), the Supreme Court of Arizona said:

> "In numerous decisions this court has stated the law to be that a driver may assume that another motorist will proceed in a lawful manner and obey the law of the road, and may act on that assumption. Accordingly, one who is driving on a through or favored highway may assume that a motorist approaching from a side road will stop in order to give him the right-of-way. *He* has a right to rely on this assumption until such time as it becomes apparent to *him*, acting as a reasonable person, that

> the other motorist does not intend to stop or give him the right-of-way. See Davis v. Weber, 93 Ariz. 312, 380 P.2d 608, and cases therein cited." (Italics added.)

The reason for the rule not requiring the driver on a through highway to stop or slow down at an intersection controlled by a stop sign is well stated in *Nichols* v. *City of Phoenix,* 68 Ariz. 124, 202 P.2d 201, 205 (1949):

> "Maricopa Road, upon which the bus was travelling, was an 'arterial highway.' The patent purpose of creating these through highways is to facilitate traffic upon them, and to that end the state may, by the erection of appropriate stop signs at points of intersection therewith, delay all traffic entering into such favored highways in order that those travelling upon them may have a preferred right of way. The defendants, Sheldon and the city through him, were operating wholly within their rights in assuming at this stage of the journey that the driver of the Ford car (Gilliland) would stop before entering the highway, and they cannot be charged with negligence in acting upon such assumption. The purpose of facilitating traffic on favored highways would be completely frustrated if travelers upon them were required to slow down at every intersecting highway, and the vast sums which have been spent in their construction, in an effort to accommodate the great volume of automobile traffic which is so indispensably a part of modern life, would be largely wasted."

There is here no evidence to support any proper inference of negligence on the part of Brown that "the driver of the Cadillac had enough time to avoid the accident." The evidence shows clearly that when the bus pulled out into the intersection the bus driver was wrong as a matter of law. In Arizona the law is as stated in Sections 28-733 and 28-855 of the Arizona Revised statutes requiring the vehicle required to "stop", to stop and yield the right of way to other favored vehicles; and not

to enter the intersection when to do so would "constitute an immediate hazard." He must therefore yield.

In this context to "constitute an immediate hazard" and that would create an emergency may be equated in terms of the factual situation of this case, where Allison was negligence per se. In 60 C.J. 363, Note 16 *"Immediate Hazard"* is dealt with accordingly as follows:

> "A motorist who is confronted by a stop signal at the intersection must give right of way to an approaching vehicle which would constitute an 'immediate hazard', which means a vehicle so close to the intersection that should it continue with undiminished speed and, should the unfavored vehicle start, the two would reach the point where their paths would converge at approximately the same time." *Brown* v. *Clancy,* D. C. Mun. App. 43 A. 2d 296.

Allison was bound by the immediate hazard restriction where here the evidence abundantly shows that at the speed of the Cadillac which Allison observed, and the speed of the bus he operated, the two vehicles were bound to collide if Allison proceeded as he did to enter the intersection. Brown should not be charged with negligence in this kind of an emergency not of his making. Neither can it be said that Brown's negligence might be predicated upon his having had "enough time to avoid the accident". The testimony of Captain Blubaum, however questionable, shows that prior to the point of inevitable contact or the no escape point of the vehicles, Allison gave Brown, traveling at 60 miles per hour, only one second to act to avoid the collision before the 3-second crash zone was entered. It was impossible to stop the Cadillac travelling at 60 miles per hour within a one-second emergency. There was no testimony that the Cadillac did not swerve to try to avoid the crash. How else could it have gotten into the position it wound up in on Casa Blanca Road facing easterly east of said State Highway 93 had it not swerved? To swerve

or to apply the brakes are two entirely different subjective elections or instinctive reactions, neither of which should be binding upon Brown, as an element of guilt, in this emergency, created by Allison. In the absence of any evidence in the rceord that in fact Brown at the speed of 60 miles per hour could have swerved and avoided the bus he should not be held negligent. The court was not authorized to speculate on what Brown could have done under the circumstances, nor was it authorized to speculate that Brown ever knew that the bus, which should have stopped, would not or could not stop. Brown's situation is most nearly similar to what the court said in *Davis* v. Weber, 93, 312, 380, p. 2d 608, supra, where the question of evidence was the turning point of the case, the court there holding:

> "Even assuming that Bauer had an unobstructed vision to his right along Peoria Avenue, which he did not have, and assuming that he did not see the Davis vehicle, still there is no evidence whatsoever upon which to predicate an assumption that Bauer could have anticipated or foreseen that the Chevrolet would not or could not stop. A driver of a motor vehicle is not under a duty to anticipate, in the absence of evidence, that the other drivers will cross negligently in violation of the boulevard law. *Moffitt* v. *Dean,* 84 Ga. App. 109, 655 E. 2d 637; *Harper* v. *Higgs,* 225 Md. 24, 169 A. 2d 661; *Loring* v. *Whitton,* 241 N.C. 273, 84 S.E. 2d 919.

In the instant case the record is barren of any evidence to support an inference of negligence on the part of Brown whose memory was lost due to the crash. As held in the *Davis case, supra,* there is *no proof of negligence* where Brown, even if he had or had not seen the bus, there is no positive evidence to support an inference of negligence on his part. Moreover, there is no support to an inference that Brown could have anticipated or foreseen that the bus would not stop or could not stop, where

it might have pulled up at slow speed to the center line dividing north and southbound traffic on State Highway 93 to be halted there, even after entering the intersection. So far as Brown is concerned the controlling fact is that the bus was travelling at slow speed toward the center line of State Highway 93 and could have stopped, as it is common knowledge that many motorists often stopped inside an intersection to yield to favored vehicles.

In *Union P. R. Co.* v. *McDonald*, 152 U.S. 262, 14 S. Ct. 619, the Supreme Court of the United States here said that persons in sudden emergencies and called upon to act under peculiar circumstances are not held to the exercise of the same degree of caution as in other cases and this court likewise has spoken on the doctrine of last clear chance, having said that under the doctrine of last clear chance a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril, or unaware of it only through carelessness, has in fact a later opportunity than the plaintiff to avert an accident. *Kansas City S. R. Co.* v. *Ellzey*, 275 U.S. 236 S. Ct. 80, 72 L. ed. 259.

There is no evidence that Brown had knowledge that the bus entering from a side road intersecting with a favored highway was not going to stop There is no evidence in the record to justify application of the rule of *Edwards* v. *Gaston*, 75 Ariz. 131, 252, P. 29, 786, nor is there evidence that Brown realized that Allison was inattentive.

II.

By reason of the foregoing, the District Court did not properly dispose of the causes of the petitioners in view of the Arizona Revised Statutes, Title 28, a uniform act regulating traffic and highways in the State of Arizona.

III.

By reason of the foregoing, the Circuit Court did not properly dispose of the causes of the petitioners in view of the Arizona Revised Statutes, Title 28, a uniform act regulating traffic and highways in the State of Arizona.

IV.

Upon the foregoing and the record herein the petitioners were denied due process and equal protection of the laws where the Circuit Court found Arnold F. Allison negligent as a matter of law and remanded solely on the question of whether his negligence was a proximate cause of the accident, without having found that Brown's negligence was the proximate cause of this accident.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of United States District Court for the District of Arizona

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Civ. No. 4150 Phx.

ELIJAH MUHAMMAD, ALBERT BROWN, FRANCES BROWN, BASHIE MUHAMMAD and JOYCE MUHAMMAD,

Plaintiffs,

against

UNITED STATES OF AMERICA, a body politie, and ARNOLD F. ALLISON,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs bring this action to recover for injuries sustained in a collision occurring about 3:15 p.m. of January 25, 1962, between a school bus and a Cadillac automobile at the intersection of Arizona State Highway 93 with Casa Blanca Road in an Indian Reservation known as Pima Indian Agency, Sacaton, Arizona. The school but was opetrated by Arnold Allison, an Indian living and employed on said Indian Reservation. He was employed as the janitor of the Indian School and at the time of the accident was acting as a substitute driver of the school bus.

This action is brought under the Federal Tort Claims Act, 28 U.S.C.A. Sec. 1346(b).

Allison was travelling in an easterly direction on Casa Blanca Road toward Sacaton and before entering the intersection, stopped 14 or 15 feet back of the stop sign.

In the vicinity of the intersection there was no object which would obstruct the view in any direction on the roads there intersecting.

Before putting the bus in motion, Allison saw the Cadillac approaching from the south. In response to a question as to where he saw the Cadillac, he stated:

> "A. Well, he was way back. I don't know how far, he was way back there. It looked safe enough for me to cross so I started across." (See Trans. p. 168, line 17, to p. 169, line 2.)

Ronnie Kurtzman, of the Arizona State Highway Patrol, who investigated the accident, testified in response to questions by plaintiffs' counsel that he was familiar with making estimations of speeds from surrounding physical facts. To a question as to the speed of the Cadillac which was operated by plaintiff Albert Brown and travelling north on Highway 93, Mr. Knudsen, Assistant United States Attorney, representing defendants, objected, and renewed the objection in the course of voir dire examination; but thereafter, during the course of such examination, he withdrew his objection. Then, in response to a question:

> "Q. What was the speed of the vehicle (the Cadillac) travelling north on Highway 93?

the Officer answered:

> A. 60 miles an hour."

And he estimated the speed of the school bus at the time of the collision at 5 to 10 miles an hour. These estimates were based on the damage done to the respective vehicles. See Trans. p. 52, lines 6 to 8; p. 53, lines 5 to 20.

Plaintiff Bashie Mahummad, in response to a question by the Court and questions by Mr. Daniels in behalf of the plaintiffs, testified:

> "The Court: When you say you saw the bus coming into the highway, you mean Highway 93? A. Yes, sir.
>
> "Q. About what speed were you travelling? A. I imagine between 50 and 60.
>
> "Q. Between 50 and 60. Had that been the speed you maintained since you left Casa Grande? A. Yes, sir."

Plaintiff Frances Brown, under examination by counsel for the plaintiffs, Mr. Daniels, testified on this question of speed. She said that she started driving automobiles when she was 14 years old and that she frequently rode in the involved Cadillac with her husband and Mr. Muhammad. And in response to the question,

> "Q. Could you estimate at that time about 3:00 o'clock on January 25, 1962, how fast your husband was driving that car?

her answer was:

> A. I would say he was driving around 55 or 60.
> "Q. Very well. Now, you saw the bus, I believe you testified you saw the bus coming into the intersection somewhere about 100 or 150 feet back? A. Yes, sir."

After discussion the witness testified:

> "The Witness: I said a block.
> "Mr. Daniels: A block?
> "The Witness: Yes, sir."

The question was then rephrased as follows:

> "Q. *By Mr. Daniels*: I believe you testified that when you first saw the bus, you were about a block more or less from the intersection?
>
> "A. As near as I can judge, yes, sir.
>
> "Q. Now, could you estimate about how fast that bus was travelling?
>
> "A. No, sir."

Officer Kurtzmdan identified plaintiffs' Exhibit 7 as a picture of State Highway 93 looking north and pointed out:

> "This depicts the gouge and marks in the highway, dig marks, the debris that I have pictured here and part of the intersection looking east and west here on Sacaton Road, Casa Blanca Road."

It is apparent from the Officer's testimony that the point of contact, the place where the accident occurred, was indicated by the debris shown in Exhibit 7 extending from a point east of the dividing white line shown in the picture to the eastern boundary of Highway 93. It is also so shown on the chart identified by Officer Kurtzman, Exhibit 18.

The Highway Patrol Officer searched for skidmarks and none were found.

Independently of the estimates of the Officer as to the speed of the Cadillac, the Court finds and concludes from the above quoted testimony of plaintiffs Bashie Muhammad and Frances Brown that the speed of the Cadillac, as it entered the intersection and continued on to the point of contact with the bus, was between 50 and 60 miles per hour; and from the speed of the Cadillac and the absence of skidmarks, and the absence of evidence to the contrary, the Court finds and concludes that the driver of the

Cadillac made no attempt to reduce the speed of his vehicle or to swerve to avoid contact with the school bus.

The evidence shows the bus to be a vehicle large enough to accommodate 65 school children and it is hard to conceive that Albert Brown, the driver of the Cadillac, if he had been exercising ordinary due care, would not have seen the bus in ample time to reduce speed or to change the course of the vehicle he was operating. We have noted that his wife, plaintiff Frances Brown, sitting beside him, first saw the bus when the Cadillac was about a block "more or less from the intersection." From the circumstances, it is evident that Brown was either not looking ahead or wantonly ignored the presence of the bus approaching the intersection. The speed of the Cadillac prior to and at the time of entering the intersection and to the point of the collision was unreasonable and unlawful under the conditions there existing, and Brown was negligent in not reducing speed or otherwise attempting to avoid contact with the school bus.

After Allison, the driver of the bus, stopped back of the stop sign, he proceeded slowly after looking in both directions; he saw the oncoming Cadillac and determined that he had ample time to safely cross the intersection, and this he would have been successful in doing if the driver of the Cadillac had reduced his speed when approaching the intersection or had slightly changed his course.

In response to a question by Mr. Maggiore, of counsel for the plaintiffs, Allison stated he did not even know how fast he was going when he proceeded across the intersection, but in response to the question:

"Q. It was pretty slow, was it not, Mr. Allison,"

he stated:

"A. Oh, yes, slow enough."

He testified there were 5 gear shifts on the school bus and that the bus was a slow moving one. From the stop he made west of the stop sign, he started to cross toward the intersection in second gear. The size of the bus and the starting from his position west of the stop sign in second gear support the estimate of Highway Officer Kurtzman that at the time of the impact, the bus was travelling 5 to 10 miles per hour.

Allison exercised due care in moving from the stop sign to the point of impact and he had a right to assume from the position of the Cadillac, at least a block from the intersection, that driver Brown would not violate the law or the rules of the road. Allison had a right to assume at the time and under the circumstances just prior to the collision that plaintiff Albert Brown would exercise due care. 60 C.J.S. 859, Motor Vehicles, Sec. 361; Davis v. Weber (Ariz.), 280 P.2d 608, 612 (14, 15); Briggs v. Koyer (Cal. App.), 32 P.2d 649, 650.

As plaintiff Brown approached the intersection, it became his duty to slow down and not to traverse the intersection as he did here in excess of 50 miles per hour. Unfortunately, the plaintiffs suffered painful injuries but such injuries were caused solely by the careless and negligent conduct of plaintiff Albert Brown in the operation and maintenance of the Cadillac automobile and such negligence is pleaded in defendants' Answer as their Second Affirmative Defense.

Now, upon consideration of all the evidence adduced at the trial, the Court, in addition to the findings hereinabove set forth, makes the following findings of fact:

Opinion of United States District Court for the District of Arizona

FINDINGS OF FACT

1. That this action is brought under the Federal Tort Claims Act, 28 U.S.C.A., Sec. 1346(b), and this Court has jurisdiction thereof.

2. That defendant Arnold F. Allison was an employee of the Bureau of Indian Affairs, Department of Interior, an agency of the United States of America.

3. That at the time of and just preceding the collision, the subject matter of this action, the defendant Arnold F. Allison was the legal holder of and had in his possession a United States Government motor vehicle operator's identification card issued by the Department of the Interior-Indian-Pima Agency, Exhibit 5 in evidence, which recites among other matters:

> "The holder of this card is qualified to operate United States Government vehicles and/or equipment specified subject to the restrictions set forth on the reverse side of this card."

On the reverse side:

> "Restrictions: 'None.'"

4. That on January 25, 1962, plaintiff Albert Brown was operating the Cadillac mentioned in a northerly direction on State Highway 93 at the approximate hour of 3:15 p.m. near and upon the intersection of said State Highway 93 with Casa Blanca Road in the State of Arizona.

5. That said Cadillac automobile, so operated by Albert Brown, approached the intersection of Casa Blanca and

State Highway 93 while travelling at a speed of between 50 and 60 miles per hour, and attempted to cross said intersection and continue north on Highway 93 without any reduction in or attempt to reduce said speed, and without making any attempt to swerve from the path of the school bus.

6. That at a point on the right hand side of Highway 93, and near the right hand boundary of said Highway, the Cadillac so operated by plaintiff Albert Brown collided with the school bus operated by defendant Arnold F. Allison.

7. That at said intersection there were no objects obstructing the view of the driver of the Cadillac or of the operator of the school bus, or of any of the occupants of the Cadillac.

8. That at all the times herein mentioned, just before driving the school bus upon the aforesaid intersection and to the point of the collision described in the evidence, said Allison operated said school bus near and upon said intersection at a speed not in excess of 10 miles per hour.

Conclusions of Law

As Conclusions of Law from the foregoing facts, the Court decides:

1. That the defendant United States of America was not guilty of negligence in employing and authorizing the defendant Arnold F. Allison, an Indian, to operate the school bus within the Pima Indian Agency, Sacaton, Arizona.

2. That the conduct of Albert Brown in driving the Cadillac into and on the aforesaid intersection to the point of collision, at a speed of 50 to 60 miles per hour, was a careless, negligent and wanton act in disregard of the rights or safety of others and that he drove said Cadillac at a speed and in a manner so as to endanger or would be likely to endanger any person or property upon said intersection.

3. That at all the times herein mentioned, just before driving the school bus upon the aforesaid intersection and to the point of collision described in the evidence, said Allison operated and drove said school bus with due caution and regard to the safety of persons and vehicles near and upon said intersection.

4. That the injuries suffered by the plaintiffs were caused solely by the careless and negligent conduct of plaintiff Albert Brown in the operation and maintenance of the Cadillac automobile, and that said Brown's negligence was the proximate cause of the collision and resulting injuries to plaintiffs.

5. That the plaintiffs, or any of them, take nothing by reason of this action or on account of the injuries which they may have sustained, or for loss of or injury to the Cadillac automobile; and that each of the defendants have judgment herein together with their costs incurred.

The defendants shall submit to the Court a form of judgment in accordance with the foregoing.

Dated this 4th day of February, 1965.

ROGER T. FOLEY,
United States Senior District Judge.

Opinion of United States Court of Appeals for the Ninth Circuit

[AUGUST 29, 1966]

No. 20,624

ELIJAH MUHAMMAD, ALBERT BROWN, FRANCES BROWN, BASHIE MUHAMMAD and JOYCE MUHAMMAD,
Appellants,

against

UNITED STATES OF AMERICA, a body politie, and ARNOLD F. ALLISON,
Appellees.

Appeal from the United States District Court for the District of Arizona.

Before: BARNES, HAMLIN and BROWNING, *Circuit Judges.*

HAMLIN, *Circuit Judge.*

As a result of a collision in the intersection of two roads in an Indian reservation in Arizona between a United States Government school bus and a Cadillac automobile an action for damages under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) was filed in the United States District Court for the District of Arizona against the United States and Arnold F. Allison, the driver of the bus, by Elijah Muhammad, owner of the Cadillac, Albert Brown, driver thereof, and the three passengers in the Cadillac—Albert Brown's wife Frances, Bashie Muhammad, and Joyce Muhammad. The action was tried before the court

without a jury and a judgment in favor of the defendants was entered. The plaintiffs filed a timely appeal to this court which has jurisdiction under 28 U.S.C. § 1291.

The evidence at the trial established that prior to the collision appellee Allison was operating an otherwise empty government school bus in an easterly direction on Casa Blanca Road in an Indian reservation in Arizona. This road intersects at approximately right angles with State Highway 93 which runs in a north-south direction. It is admitted that at the time of the accident Allison was acting in the course and scope of his employment by the United States Government. Just prior to the time of the collision the Cadillac automobile was proceeding in a northerly direction on Highway 93 and was south of the intersection of said highway with Casa Blanca Road. There were no obstructions to the view of either driver at the intersection which was in an undeveloped open desert area.

At the trial Brown, the driver of the Cadillac, had no recollection of the events preceding the accident and was unable to testify as to when if ever he had seen the school bus before the collision. Frances Brown, who was sitting in the front seat with her husband Albert Brown, the driver of the Cadillac, testified that when she first saw the bus the Cadillac was about a block from the intersection. She also testified that when she saw the bus coming into the intersection the Cadillac was "about a hundred or a hundred and fifty feet back."

Allison testified that he stopped the 65-passenger school bus 14-15 feet back of a stop sign which was located on Casa Blanca Road 50 feet west of its intersection with Highway 93. Allison testified that he saw the Cadillac on Highway 93 at a distance estimated to be over a thousand feet south of the intersection and that when he started across "it looked safe enough for me to cross." After so stopping he proceeded in second gear at a speed of 5 to 10

miles an hour across the intersection to the point of collision which was about 18 feet east of the west edge of Highway 93.

The speed of the Cadillac was estimated to have been between 50 and 60 miles an hour. No skid marks of the Cadillac on the highway before the collision were found by the highway patrol.

The accident having occurred in Arizona, the law of that state applies. 28 U.S.C. § 1346(b). *Woodbury* v. *United States,* 313 F.2d 291 (9th Cir. 1963).

In his findings of fact and conclusions of law the district judge found that Brown, the driver of the Cadillac, made no attempt "to reduce the speed of his vehicle or to swerve to avoid contact with the school bus." He further found that "it is evident that Brown was either not looking ahead or wantonly ignored the presence of the bus approaching the intersection. The speed of the Cadillac prior to and at the time of entering the intersection and to the point of the collision was unreasonable and unlawful under the conditions there existing, and Brown was negligent in not reducing speed or otherwise attempting to avoid contact with the school bus." The court concluded that the accident and the resultant injuries "were caused solely by the careless and negligent conduct of plaintiff Albert Brown" and that "said Brown's negligence was the proximate cause of the collision and resulting injuries to plaintiffs."

The duty of a driver on a favored highway is not absolute. "He must maintain that degree of care which a reasonably prudent person would use to discover dangerous situations and avoid injury to others." *Egurrola* v. *Szychowski,* 95 Ariz. 194,, 388 P.2d 242, 243 (1964). *Davis* v. *Weber,* 93 Ariz. 312, 380 P.2d 608 (1963); *Edwards* v. *Gaston,* 75 Ariz. 131, 252 P.2d 786 (1953).

We hold that there is ample evidence in the record to justify the finding of negligence on the part of Brown. The

lack of Cadillac skid marks, its speed, and the testimony of the passenger Frances Brown, set out above, is sufficient evidence upon which the trier of fact could have found hat the driver of the Cadillac had enough time to avoid the accident either by applying his brakes or swerving once he became aware or would have become aware had he maintained a proper lookout that the bus was not going to stop, and by his failure to do either he was not acting as a reasonably prudent driver. *Edwards* v. *Gaston, supra.*

The court further concluded from the evidence that "just before driving the school bus upon the aforesaid intersection and to the point of collision described in the evidence, said Allison operated and drove said school bus with due caution and regard to the safety of persons and vehicles near and upon said intersection."

An examination of the record convinces us, however, that the court's conclusion of non-negligence on the part of the bus driver is in error and that the undisputed evidence in the case requires a finding of negligence on his part.

Paragraph D of section 28-855 of the Arizona Revised Statutes provided as follows:

> "D. Every driver of a vehicle approaching a stop sign shall stop before entering the cross walk on the near side of the intersection or, in the event there is no cross walk, shall stop at a clearly marked stop line, but if none, then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection . . . ."[1]

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[1] In 1965, subsequent to the accident involved herein, there were some minor changes in wording in this subsection by an amendment; however, it remains unchanged in substance. 9 A.R.S. § 28-855 (Supp. 1965).

At the intersection where the accident in this case occurred there was no cross walk on the near side of the intersection and there was no clearly marked stop line. The above section therefore required that Allison stop "at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection." The testimony is undisputed that at the intersection of Casa Blanca Road and Highway 93 there are no obstructions to view of any kind and that the intersection was in an undeveloped, open desert area. Under the above section and under these facts Allison was required to stop at or immediately prior to entering the intersection. This he failed to do. His own testimony was that he stopped 14-15 feet back of the stop sign and that the stop sign was 50 feet west of the west edge of Highway 93. This would make the point of his stopping some 64 or 65 feet from the entrance to the intersection.

Section 28-773 of the Arizona Revised Statutes provides in part as follows:

> "A. The driver of a vehicle shall stop as required by § 28-855 at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard . . . .
>
> "B. The driver of a vehicle shall likewise stop in obedience to a stop sign as required by this chapter at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway, and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed."

The undisputed testimony of Allison himself is that when he was stopped at the point some 64 or 65 feet wast of the intersection, he looked to the south, the direction from which the Cadillac was coming, and then started his bus at a speed of 5 to 10 miles an hour, looking at all times thereafter to the north or to his left, and that never at any time after starting his bus from its stopped position did he look to his right before the collision of the bus and the Cadillac.

Where a party violates a statute which is intended to prevent the type of harm whieh in fact has occurred as a result of that violation, the party is negligent as a matter of law. Prosser, Torts, 202 (3d ed. 1964). In Arizona law the violation of specific requirements of a law or ordinance is negligence per se. *Deering* v. *Carter*, 92 Ariz. 329, 376 P.2d 857 (1962); *Mitchell* v. *Emblade*, 80 Ariz. 398, 298 P.2d 1034 (1956). Barring an affirmative defense, the violating party is liable if his negligence in violating the statute contributed proximately to the cause of the accident. See *J. H. Welch* v. *Gardner*, 96 Ariz. 95, 99, 392 P.2d 567 (1964). Stop signs on streets intersecting a protected highway are designed to facilitate travel on the protected highway and to reduce the risk of collision in the intersection. *Nichols* v. *City of Phoenix*, 68 Ariz. 124, 202 P.2d 201 (1949). Where a party does not obey a stop sign or the law of the right of way at an intersection and a collision in the intersection ensues, then the party is negligent as a matter of law. *Wolfe* v. *Ornelas*, 84 Ariz. 115, 324 P.2d 999 (1958); *Texas-Arizona Motor Freight* v. *Mayo*, 70 Ariz. 323, 220 P.2d 227 (1950); *Clinkscales* v. *Carver*, 22 Cal. 2d 72, 136 P.2d 777 (1943). See also 3 A.L.R. 3d 180 (1965). The undisputed evidence establishing that Allison did not stop at the entrance to the intersection compels a finding that Allison did violate the Arizona statutes and that such violation was negligence on his part. Whether such negligence was a proximate cause of the accident is a matter to be determined by the trier of fact.

While the finding of negligence on the part of the driver of the Cadillac would not only bar his recovery but also a recovery by his wife, Frances Brown, for her injuries [2] and the recovery for property damage to the automobile by the owner of the car who was the driver's employer,[3] it would not necessarily bar a recovery by the other two passengers in the car, Bashie Muhammad and Joyce Muhammad. *Salt River Valley Water Users Assn.* v. *Green,* 56 Ariz. 22, 104 P.2d 162 (1940); *Hunsaker* v. *Smith,* 1 Ariz. App. 51, 399 P.2d 185 (1965). There is no evidence in the record to indicate that Brown's negligence should be imputed to either Bashie or Joyce Muhammad. There is no finding by the district court as to their negligence or as to any damages they may have suffered. If they were not guilty of negligence and if the accident and their resultant injuries, if any, were proximately caused by the combined negligence of Brown and Allison, they would be entitled to recover.

The judgment of the district court that Bashie Muhammad and Joyce Muhammad "take nothing" is reversed, and the action as to them is remanded to the district court for such action as may be proper in accordance with this opinion. The judgment of the district court against Elijah Muhammad, Albert Brown and Frances Brown is affirmed.

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[2] In Arizona, a community property state, the contributory negligence of one spouse will bar recovery for personal injuries to the other spouse. Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956).

[3] The general rule is that the contributory negligence of the driver of a vehicle will bar recovery by the owner when the driver is acting as the agent for the principal at the time of the accident. 65 C.J.S. § 168(a). The undisputed testimony of the driver of the Cadillac was that he was the chauffeur for the owner and on the day of the accident he was driving with the owner's permission for the purpose of keeping the car in running shape. Therefore, the contributory negligence of the driver while acting as the owner's agent bars recovery by the owner.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1006

ELIJAH MUHAMMAD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners commenced this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671–2680, to recover for personal injuries and property damage sustained in a collision between their automobile and a government bus in Arizona (Pet. 6). The district court found, on the evidence, that petitioner Albert Brown (the driver of the private vehicle) was negligent and accordingly entered judgment against petitioners (Pet. App. 21–29). The court of appeals affirmed as to petitioners, stating that "there is ample evidence in the record to justify the [district court's] finding of negligence on the part of Brown" (Pet. App. 32). Petitioners' principal question presented

245-822—67

for review here is, "whether there was negligence on the part of Albert Brown in driving the car at the time of the accident" (Pet. 3). Indeed, that is the only question discussed by petitioners (Pet. 11–19). But this question does not warrant further review by this Court, especially in view of the concurrent determinations of negligence and the findings of fact by the two courts below. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. The petition should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967